

**LEVENGOOD  
GAME FARM**

**DECISION DOCUMENT  
SEPTEMBER 11, 1998**

**PROPOSED GAME FARM APPLICATION**

On April 5, 1998 Montana Fish, Wildlife & Parks (FWP) received an application from Scott Levengood to build a new 45-acre elk game farm at 425 N. Somers Stage Rd, south of Kalispell, MT. The applicant proposes to build this facility in two phases with the first phase encompassing approximately 10 acres and quarantine handling facilities. The proposed game farm would occupy existing farm land.

**THE MONTANA ENVIRONMENTAL POLICY ACT PROCESS (MEPA)**

Pursuant to MEPA, FWP is required to assess the impacts of the proposed action to the human environment. FWP completed and issued its Draft Environmental Assessment (EA) of the proposed project on July 31, 1998. During the development of the Draft EA, FWP determined that a full Environmental Impact Statement would not be required. The Draft EA was distributed to the Montana Environmental Quality Council, Montana Department of Environmental Quality, Montana Historical Society, Montana State Library, Montana Environmental Information Center, Montana River Action Network, Montana Department of Livestock, state and local libraries, Montana Wildlife Federation, Flathead County Commissioners, Flathead County legislative representatives for the proposed game farm area, Flathead Wildlife, Inc., and other interested individuals.

The public comment period began August 3 and closed on August 24, 1998. No public hearing was held.

**ISSUES OF CONCERN IN THE EA**

No significant impacts which could not be mitigated or minimized were identified in this Draft EA. The Final EA for the proposed Game Farm Expansion contains a summary of the Proposed Action, a description of the affected environment, and potential consequences of the Proposed Action. The Final EA recommends mitigation measures to reduce impacts to soils, water quality, air quality, noise, other wildlife, and cultural resources. A stipulation requiring the applicant to report any ingress of wild game animals or egress of domestic elk immediately to FWP was proposed.

*Flathead*

## **SUMMARY OF PUBLIC RESPONSES**

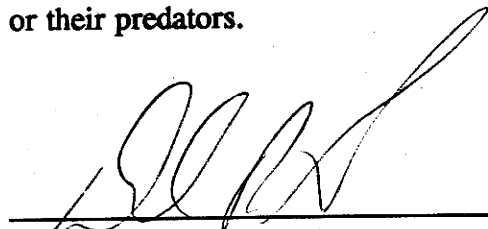
During the public comment period, FWP received three written comments to the Draft EA. Substantive comments and questions are included in the attached Final EA. The public did not raise any new issues not already addressed in the Draft EA.

## **THE DECISION AND STIPULATIONS**

After reviewing the application, the Draft EA, and public comments, I approve the issuing of a game farm license with the following stipulation described in both the Draft and Final EA's.

*Report the ingress of any wild game animals or egress of domestic elk to FWP immediately. The report must contain the probable reason why or how ingress/egress was achieved.*

The purpose of this stipulation is to reduce the potential risk of significant impacts to native wildlife populations associated with any contact between domestic elk and native game animals or their predators.



Daniel P. Vincent  
Regional Supervisor

9/11/98

Date

\_\_\_\_\_  
Scott Levensgood

\_\_\_\_\_  
Date

# **FINAL ENVIRONMENTAL ASSESSMENT**

## **LEVENGOOD ELK GAME FARM**

### **MONTANA ENVIRONMENTAL POLICY (MEPA) PROCESS**

Montana Fish, Wildlife and Parks (FWP) is required to perform an environmental analysis in accordance with the Montana Environmental Policy Act for each proposal for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment (Administrative Rules of Montana [ARM] 12.2.430). FWP prepares environmental assessments (EAs) to determine whether a project would have a significant effect on the environment. If FWP determines that a project will have a significant impact that cannot be mitigated to a minor impact, the agency will prepare a more detailed environmental impact statement (EIS) before making a decision. If the agency determines that a proposed project will not have a significant impact, or that the impact can be mitigated to minor or none, the agency may make its licensing decision based upon the results of the EA and criteria established under Montana game farm statute Montana Code Annotated (MCA) Title 87, Chapter 4, Part 4.

Mitigation measures may be considered in FWP's analysis as a means to reduce the impact(s) of a game farm to a level below significance. FWP may also recommend mitigation measures to reduce impacts that are considered minor.

The FWP prepared a Draft EA for the proposed Levengood Elk Game Farm which identified no significant impacts from the Proposed Action that could not be mitigated. The Draft EA was released for public review and comment from August 3, 1998. Public comments were accepted through August 24, 1998. The Draft EA, as modified herein, is hereby approved as the Final EA. This Final EA for the proposed Levengood Game Farm Expansion contains a summary of the Proposed Action, a description of the affected environment, and potential consequences of the Proposed Action, all of which are described in additional detail in the Draft EA which is adopted in this Final EA. This document also describes mitigation measures, includes public comments, and provides the conclusion of the EA. The preferred alternative is the Proposed Action with one required stipulation and several recommended mitigation measures.

### **PROPOSED ACTION**

FWP received a completed application on April 5, 1998 to build a new 45 acre Elk Game Farm approximately 4 miles south and east of Kalispell, Montana. The site is located in Flathead County along Ashley Creek. The game farm would include new quarantine and handling facilities as part of the proposed project.

The proposed game farm would be licensed for a maximum of 60 elk animals. The land within the proposed project area is currently agricultural land used for hay or crop production.

The purpose of the proposed project is to diversify agricultural production and complement other private recreational activities located on the property (private game bird farm, trout pond, and trap shooting).

Fence construction would comply with proposed changes to the FWP game farm rules, and would include 8-foot high, tightlock mesh game fence supported by wooden posts or 2 3/4-inch steel pipes set 3 feet into the ground and spaced not more than 24 feet apart. The applicant plans to breed, sell, and dispose of domestic elk in accordance with Montana game farm and disease control requirements stipulated in Montana statute and administrative rules. The game farm would provide meat, antlers, and trophy sales (sale of live animal), as well as elk breeding stock. Fee or any type of sport shooting of elk would not be conducted at the site.

## **ALTERNATIVES**

One alternative (No Action Alternative) was evaluated in this EA. Under the No Action Alternative, FWP would not issue a license for the Levensgood Elk Game Farm as proposed. Therefore, no game farm animals would be placed on the proposed game farm area. Implementation of the No Action Alternative would not preclude other activities allowed under local, state and federal laws to take place at the proposed site.

## **AFFECTED ENVIRONMENT**

The proposed Levensgood Elk Game Farm area would ultimately comprise approximately 45 acres of existing agricultural land located in Flathead County approximately 4 miles south and a little east of Kalispell, Montana. The site is located approximately 300 -1,000 feet north of Ashley Creek, a tributary to the Flathead River. At present, the remaining 15 acres of this property includes a private trout pond, game bird farm and private trap shooting range. Both a caretaker and landowner have residences bordering the proposed game farm.

The proposed game farm would be constructed in 2 phases. The first phase would enclose approximately 10 acres and include quarantine and handling facilities. Phase 2 would enclose another adjoining 35 acres.

All surrounding lands are privately owned and used primarily for agriculture including crops, pasture, and hay. Some of the area has been subdivided into small 20 acre rural residential lots. The proposed elk farm lies within an area zoned as Agricultural-20.

Approximately 12 neighboring residences are located within a 1-mile radius of the site. This section summarizes the primary environmental resources in the project area.

The site is situated approximately 2,900 feet above mean sea level. The general topography of the proposed game farm expansion is nearly level valley floor. The site is approximately 300 - 1,000 feet north of the Ashley Creek, 1/2 mile south of the Flathead River and 6 miles north of Flathead Lake. Ashley Creek flows north to join the Flathead River. All of the proposed game farm lies between the 100-year and 500-year floodplain (FEMA maps, revised 1996). Water from 2 existing wells on the property would serve the proposed game farm. Well depths are 296 and 358 feet. The proposed project would not include any of the 100-year floodplain inside the perimeter fence.

Most of the land surrounding the proposed game farm site is in agricultural production. Riparian and wetland vegetation exists along Ashley Creek and Weaver Slough to the south and the Flathead River to the north. Typical species along these waterways include black cottonwood, chokecherry, hawthorn, red-osier dogwood, willows, cattails, and sedges. Pasture and haylands typically contain alfalfa, quack grass, smooth brome, orchard grass, and timothy. Dandelions and clover are also common.

This area supports wildlife typical of agricultural and riparian areas in the Flathead Valley. Common species include white-tailed deer, waterfowl such as mallards and Canada geese, upland game birds such as ring-necked pheasant and Hungarian partridge. Common nongame wildlife species include western meadowlarks, common flickers, black-billed magpies, meadow voles, terrestrial garter snakes, and savannah sparrows. The area is not critical deer winter range nor an important big game migration corridor.

The area is not considered habitat for gray wolves, grizzly bears, peregrine falcons, whooping crane, or bull trout, species listed as threatened or endangered by the federal government. The bald eagle is a year-long resident and also migratory through this area. The closest active bald eagle nest is located approximately a mile north and a little west of the proposed project area along the Flathead River. The bald eagle is now scheduled for delisting. The peregrine falcon might pass through this area on a migratory basis. The bull trout is a proposed species for Federally listing as threatened and occurs in limited numbers in Flathead Lake and Flathead River. Ashley Creek does not support habitat for bull trout (T. Weaver, FWP pers. comm). There are no other Federally listed threatened or endangered species likely to occur in this area. Other large carnivores such as mountain lions and black bears are infrequent visitors to the Lower Valley area.

## **ENVIRONMENTAL CONSEQUENCES**

Only resources that have potential adverse effects from the Proposed Action are summarized in this section. A detailed discussion of environmental consequences is contained in *Part II* of this EA.

### ***Land Resources***

The construction and operation of a 60-elk capacity game farm could reduce land and soil resource values due to compaction or heavy grazing. These impacts, however, can be reduced or eliminated by adjusting stocking rates; rotating, resting, and irrigating pastures; and supplemental feeding of elk.

### ***Water Resources***

The Proposed Action of grazing up to 60 elk on 45 acres of pasture is likely to have no adverse affect on water resources. All of the proposed game farm lies in Zone B, above the 100- year floodplain. The game farm lies between 300 and 1,000 feet from Ashley Creek.

### ***Vegetation Resources***

The Proposed Action plans to place up to 60 adult elk within the 45 acre enclosure for a maximum stocking density of 0.75 acres per adult elk. It is estimated that the average adult elk consumes about 11 pounds of forage each day and that annual forage consumption would be about 4,015 pounds of forage per adult animal or 240,900 pounds/elk farm/year. Assuming an average of 5,000 pounds/acre (2.5 ton/acre) of forage production within the enclosure, the 225,000 pounds of forage would almost meet the year-long forage needs of 60 adult elk. Supplemental feed would probably be required during the winter. Production on site is dependent on management and could improve with irrigation and fertilization. There would be no direct impacts to native vegetation because it has already been lost from this site.

### ***Wildlife Resources***

The Proposed Action is not expected to significantly change the diversity or abundance of nongame species living in this area. The elk enclosure will eliminate use of the 45 acres by white-tailed deer. The proposed game farm is not large enough to significantly influence any seasonal movement of white-tailed deer through this area. The daily movements of a few deer may be changed to a minor degree, but this would not be significant. Use of the existing land by other common species in the area such as Canada geese, mallards, and ring-necked pheasants would probably decrease or be eliminated when the game farm is at full capacity. Pheasants and other larger birds, such as falcons in pursuit of prey, might fly into the fence and be fatally injured. This would affect individuals but not populations.

The proposed game farm does not support habitat for grizzly bear or gray wolf. Bald eagles, a threatened species, use Ashley Creek, Flathead River, and surrounding agricultural lands year-round. The closest bald eagle nest is approximately a mile north and east of the Proposed Project. Bald eagles are proposed for delisting. Neither construction nor operation should affect bald eagle reproduction or use of the general area.

There is a potential of domestic elk carrying or becoming infected with a contagious wildlife disease or parasite such as tuberculosis, chronic wasting disease, or meningeal worm and then coming in contact (through-the-fence, nose-to-nose, nose-to-soil, or ingress/egress) with wild deer, elk, or other wildlife. Release of a contagious disease in the wild could severely impact native wildlife populations. It is also possible that disease and parasites carried by wild elk could be introduced to domestic elk with equally severe impacts. Ingress of wild deer would likely result in the destruction of trespassing animals. The risk of contact between game farm elk and wild animals is reduced significantly by the required "stipulation". The risks can be further reduced if the recommendations are followed.

### ***Community Impacts***

The Proposed Action is consistent with the land use and values of the community in the vicinity of the proposed game farm. While the Proposed Action may increase the income level for the applicant and increase taxes paid to the county, it is not expected to significantly impact community income levels. There would be no public or fee hunting allowed at the game farm site. The presence of the game farm would not restrict the landowner nor adjoining landowners from hunting and discharging firearms on their properties.

### ***Impacts to Public Services/Taxes/Utilities***

Approval of a license would require reviews and inspections by FWP personnel. Implementation of the Proposed Action would provide the county with similar or slightly more tax revenue paid by the applicant if the proposed game farm area continued to be used for crop production or livestock grazing. The collected taxes would go into the county general fund and the local school district.

### ***Impacts to Cultural Resources***

Because no cultural resource inventory has been conducted in the area, there is a possibility that unknown or unrecorded cultural properties may be present at the site.

## **REQUIRED STIPULATION**

The following stipulation is designed to mitigate significant impacts identified in the EA to below the level of significance:

*Report the ingress of any wild game animals or egress of domestic elk to FWP immediately. The report must contain the probable reason why or how ingress/egress was achieved.*

This stipulation is imposed to mitigate potentially significant risk to wildlife health posed by the proposed game farm. Risk to wildlife health from contact between game farm animals and wild game is potentially significant due to the site being located in an area currently utilized by wild game.

The information provided by this stipulation would help both the applicant and FWP to address ingress and egress incidents and to minimize contact between wild and domestic animals. This stipulation, particularly with other FWP wildlife protection recommendations, would effectively reduce the risk to wildlife health to below significant.

Fee or sport shooting of elk is not proposed as part of the game farm; therefore, this activity was not evaluated as part of the EA and would not be allowed as part of the game farm license.

## **RECOMMENDED MITIGATION MEASURES**

The following mitigation measures address minor impacts identified in the EA that are likely to result from the Proposed Action. Many of these measures, particularly those listed under wildlife, further reduce the potential impact associated with contact between wild animals and domestic elk and help insure fence integrity.

- Maintain a reasonable stocking rate within the game farm enclosure to maximize vegetative cover and minimize runoff, erosion, and potential changes in soil structure. A "reasonable stocking rate" is defined under *EA Definitions*, in Part II of the Environmental Review.
- Use appropriate dust management activities, including spraying water on unpaved roads during the dry season, vegetating exposed ground where possible, protecting soil piles from wind erosion, and limiting ground disturbances to the area necessary to complete the job.
- Incorporate waste into soil quickly by plowing or discing.
- Spread waste during cool weather or in the morning during warm, dry weather.
- Cover animal carcasses buried on the game farm with a minimum of 2 feet of soil; carcasses may also be sent to a licensed municipal landfill if approved by the landfill operator. Carcasses should not be disposed of in or adjacent to water bodies, roads, or ditches



- Potential water quality impacts also could be minimized by disposing of excess fecal material at a site that is isolated from surface or ground water.
- Provide supplemental feed to the elk during fall and winter to reduce the probability of overgrazing in the enclosure and to provide for the nutritional requirements of elk.
- Store hay, feed, and salt away from exterior fences, or in buildings.
- Feed game farm animals at the interior of the enclosure and not along the perimeter fence.
- Inspect the exterior game farm fence on a regular basis and immediately after events likely to damage the fence to insure its integrity with respect to trees, burrowing animals, predators and other game animals.
- Adjust fence requirements to include double fencing, electrification, or increased height, if fence integrity or ingress/egress becomes a problem.
- Stock a minimal number of bulls to minimize bugling during the mating season.
- Limit noisy construction activities to daylight hours and complete work as quickly as possible.
- Mitigate impacts to cultural resources by stopping work in the area of any observed archeological artifact. Report discovery of historical objects to:

Montana Historical Society  
 Historic Preservation Office  
 1410 8th Avenue  
 P.O. Box 201202  
 Helena, Montana 59620  
 (406) 444-7715.

If work stoppage in the area containing observed artifacts is not possible, record the location and position of each object, take pictures and preserve the artifact(s).

## **SUMMARY OF PUBLIC COMMENTS AND FWP RESPONSES**

Public comments for the Levengood Game Farm Draft EA were accepted from August 3 through August 24, 1998. FWP received three written comments during that time. Substantive comments and questions are reproduced with FWP responses. Public comments

are considered substantive if they relate to inadequacies or inaccuracies in the analysis or methodologies used in the Draft EA, or identify new impacts or recommend reasonable new alternatives or mitigation measures; or involve disagreements or interpretations of impact significance. Comments which express personal preferences or opinions on the proposal rather than on the evaluation itself are noted but are not specifically addressed.

### **Written Comment #1**

#### **Issue 1a:**

*Wild animals belong to the public. There is a long Montana tradition of public ownership of wildlife with its fair harvest open to all and participated in by many. Times are changing and the privatization of wildlife has evolved so quietly that it has just about gone unnoticed.*

#### **Response to Written Comment 1a:**

Comment noted.

#### **Issue 1b:**

*Montana's native wildlife co-evolved with the terrain, vegetation, water and climate. Escape of diseased, hybridized animals will disrupt the natural balance that support our native game animals.*

#### **Response to Written Comment 1b:**

The applicant proposes to operate the Levengood Game Farm in compliance with Montana FWP and DoL regulations. Game farm operators must comply with fencing standards outlined in ARM 12.6.1503A and maintain fencing in a game-proof condition at all times to prevent animals from escaping from or entering the game farm premises. Prior to importation into Montana, game farm animals must be examined by an accredited veterinarian and test negative for tuberculosis, brucellosis, and other diseases and must test negative for red deer hybridization (ARM 12.6.1515). These requirements, in combination with the proposed license stipulation and recommended mitigative measures, should reduce this risk below significance level.

#### **Issue 1c:**

*Elk farming is a business so destructive in the Montana context, that it should not be permitted.*

#### **Response to Written Comment 1c:**

Comment noted.

**Issue 1d:**

*The sheer scale of the game farming business, the poor husbandry, the illegal traffic in game animals, the poor enforcement of regulations and the powerful political lobbies supporting it, will make law breaking and disease spread inevitable.*

**Response to Written Comment 1d:**

The Proposed Action does not include large scale game farming, the use of poor animal husbandry, or illegal activities. The risk of disease transmission potential is reduced by the proposed recommendations and game farm license stipulation (see 1b above).

**Issue 1e:**

*Please reject the Scott Levengood elk farm application for the above reasons.*

**Response to Written Comment 1e:**

Based on existing information, all identified environmental effects can be mitigated through the proposed stipulation and through other recommendations, particularly those which reduce the potential contact between wild animals and domestic elk and increase fence integrity.

**Written Comment #2**

**Issue 2a:**

*I am opposed to any wild game farming. There are many documented cases across the country of penned game developing communicable diseases and then spreading it to neighboring wild herds. We can hardly afford to put our local herds at risk. "*

**Response to Written Comment 2a:**

The issue of disease transmission is potentially significant and was addressed in the Draft EA. FWP's proposed license stipulation, in addition to existing fencing and inspection requirements, should reduce the risk of contact between wild and domestic elk to a degree where the risk is considered minimal. In addition, FWP strongly recommends that certain other actions take place to further minimize risk to fence integrity and reduce the attraction of the game farm to wild animals.

**Issue 2b:**

*I also see the penning of wild animals as detrimental to the public image of professional game management and potentially to hunting in general.*

**Response to Written Comment 2b:**

Comment noted.

**Issue 2c:**

*I worry that overstocked game farms would be tempted to control their excess herds by offering "canned" hunts."*

**Response to Written Comment 2c:**

The applicant is not proposing any type of "sport" or fee shooting of elk as part of the game farm operation. The applicant would be limited to 60 animals on 45 acres under the proposed license. In addition, existing game farm regulations require strict accounting for elk numbers including the addition or loss of any elk from licensed game farms. The issue of shooting elk by members of the public or any other individual for "sport" was not addressed by the Draft EA nor the Final EA and would not be permitted by the license.

**Written Comment #3**

**Issue 3a:**

*We concur with your recommendations regarding the discovery of cultural properties in the area. We would ask that if such resources are encountered that our office be contacted."*

**Response to Written Comment #3a:**

This recommendation has been included in the Final EA.

**CONCLUSION OF THE EA**

The Draft EA, as modified herein, is approved as the Final EA. The preferred alternative is the Proposed Action, modified with one stipulation requiring the immediate reporting of ingress/egress events. Based upon this review, it is determined that the Proposed Action with the required stipulation would not have a significant impact on the environment and that an EIS will not be required. The EA further concludes that the risk of disease transmission between domestic elk and wildlife can be further reduced if other recommendations are followed.

**ANALYSIS OF IMPACT ON PRIVATE PROPERTY**

Montana game farm statutes (87-4-476, MCA) require that game farm licenses may be denied or issued with stipulations to prevent unacceptable threat of escape of captive game farm animals and to prevent a significant threat to the safety of the general public and surrounding landowners and by the shooting of game farm animals. MEPA requires FWP to identify and analyze environmental impacts of the Proposed Action and potential mitigation measures. MEPA, as revised by Senate Bill 231 of 1995, also requires agencies to evaluate the impact on

private property of regulatory actions, such as denial of a permit or establishment of permit conditions (75-1-201, MCA). The Environmental Quality Council (EQC) has established procedural guidelines to implement these requirements. The analysis provided in the Draft EA was prepared in accordance with implementation guidance issued by the EQC.

In addition, the Private Property Assessment Act (2-10-101, MCA, et seq.) requires agencies to determine whether proposed actions by the State of Montana have "taking or damaging implications", such as to constitute a deprivation of private property in violation of the United States or Montana constitutions and, if so, to perform an impact assessment to determine the likelihood that a state or federal court would hold that the action is a taking or damaging, to review alternatives, and to determine the estimated cost of compensation. In accordance with the Act, the attorney general has prepared guidelines, including a checklist, to assist agencies in identifying and evaluating actions with taking or damaging implications.

The Draft EA contains FWP's completed checklist with respect to the stipulation recommended in the preferred alternative and has found that the preferred alternative does not have taking or damaging implications and that an impact assessment is not required.

#### **PERSONS RESPONSIBLE FOR PREPARING THE EA AND RESPONSE TO COMMENTS**

##### **Fish, Wildlife & Parks**

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(406) 444-2535

## Part 6 Contested Cases

**2-4-601. Notice.** (1) In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice.

(2) The notice must include:

- (a) a statement of the time, place, and nature of the hearing;
- (b) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (c) a reference to the particular sections of the statutes and rules involved;
- (d) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished.

(e) a statement that a formal proceeding may be waived pursuant to 2-4-603.

**History:** En. Sec. 9, Ch. 2, Ex. L. 1971; R.C.M. 1947, 82-4209(1), (2); amd. Sec. 1, Ch. 277, L. 1979.

**2-4-602. Discovery.** Each agency shall provide in its rules of practice for discovery prior to a contested case hearing.

**History:** En. Sec. 19, Ch. 285, L. 1977; R.C.M. 1947, 82-4220(3).

**2-4-603. Informal disposition and hearings — waiver of administrative proceedings.** (1) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(2) Except as otherwise provided, parties to a contested case may jointly waive in writing a formal proceeding under this part. The parties may then utilize informal proceedings under 2-4-604. Parties to contested case proceedings held under Title 37 or under any other provision relating to licensure to pursue a profession or occupation may not waive formal proceedings.

(3) If a contested case does not involve a disputed issue of material fact, parties may jointly stipulate in writing to waive contested case proceedings and may directly petition the district court for judicial review pursuant to 2-4-702. The petition shall contain an agreed statement of facts and a statement of the legal issues or contentions of the parties upon which the court, together with the additions it may consider necessary to fully present the issues, may make its decision.

**History:** En. Sec. 9, Ch. 2, Ex. L. 1971; R.C.M. 1947, 82-4209(4); amd. Sec. 2, Ch. 277, L. 1979.

**2-4-604. Informal proceedings.** (1) In proceedings under this section, the agency shall, in accordance with procedures adopted under 2-4-201:

- (a) give affected persons or parties or their counsel an opportunity, at a convenient time and place, to present to the agency or hearing examiner;
- (i) written or oral evidence in opposition to the agency's action or refusal to act;

(ii) a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction; or

(iii) other written or oral evidence relating to the contested case.

(b) if the objections of the persons or parties are overruled, provide a written explanation within 7 days.

(2) The record must consist of:

- (a) the notice and summary of grounds of the opposition;
- (b) evidence offered or considered;
- (c) any objections and rulings thereon;
- (d) all matters placed on the record after ex parte communication pursuant to 2-4-613;
- (e) a recording of any hearing held, together with a statement of the substance of the evidence received or considered, the written or oral statements of the parties or other persons, and the proceedings. A party may object in writing to the statement or may order at his cost a transcription of the recording, or both. Objections shall become a part of the record.

(3) Agencies shall give effect to the rules of privilege recognized by law.

(4) In agency proceedings under this section, irrelevant, immaterial, or unduly repetitious evidence must be excluded but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence is admissible in a trial in the courts of Montana. Any part of the evidence may be received in written form, and all testimony of parties and witnesses must be made under oath. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient in itself to support a finding unless it is admissible over objection in civil actions.

(5) A party may petition for review of an informal agency decision pursuant to part 7 of this chapter.

**History:** En. Sec. 3, Ch. 277, L. 1979.

### Cross-References

Privileges, Title 26, ch. 1, part 8.

Rules of privileges, Rules 501 through 505, M.R.Ev. (see Title 26, ch. 10).

Oaths or affirmations of witnesses, Rule 603, M.R.Ev. (see Title 26, ch. 10).  
Hearsay rules for District Court, Rules 801 through 806, M.R.Ev. (see Title 26, ch. 10).

**2-4-605 through 2-4-610 reserved.**

**2-4-611. Hearing examiners — legal services unit — conduct of hearings — disqualification of hearing examiners and agency members.** (1) An agency may appoint hearing examiners for the conduct of hearings in contested cases. A hearing examiner must be assigned with due regard to the expertise required for the particular matter.

(2) An agency may elect to request a hearing examiner from an agency legal assistance program, if any, within the attorney general's office or from another agency. If the request is honored, the time, date, and place of the hearing must be set by the agency, with the concurrence of the legal assistance program or the other agency.

(3) Agency members or hearing examiners presiding over hearings may administer oaths or affirmations; issue subpoenas pursuant to 2-4-104; provide for the taking of testimony by deposition; regulate the course of hearings, including setting the time and place for continued hearings and fixing the time

for filing of briefs or other documents; and direct parties to appear and confer to consider simplification of the issues by consent of the parties.

(4) On the filing by a party, hearing examiner, or agency member in good faith of a timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as a part of the record and decision in the case. The agency may disqualify the hearing examiner or agency member and request another hearing examiner pursuant to subsection (2) or assign another hearing examiner from within the agency. The affidavit must state the facts and the reasons for the belief that the hearing examiner should be disqualified and must be filed not less than 10 days before the original date set for the hearing.

History: En. Sec. 11, Ch. 2, Ex. L. 1971; R.C.M. 1947, 82-4211(part); and. Sec. 1, Ch. 467, L. 1979; and. Sec. 2, Ch. 3, L. 1985.

**Cross-References**  
Power to administer oaths, 2-16-116.  
Depositions, Rules 27 through 32, Title 26, ch. 10.  
M.R.Cy.P. (see Title 25, ch. 20).

**2-4-612. Hearing — rules of evidence, cross-examination, judicial notice.** (1) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(2) Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence. Objections to evidentiary offers may be made and shall be noted in the record. When a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

(3) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(4) All testimony shall be given under oath or affirmation.

(5) A party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence.

(6) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data. They shall be afforded an opportunity to contest the material so noticed.

(7) The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

History: En. Sec. 9, 10, 11, Ch. 2, Ex. L. 1971; R.C.M. 1947, 82-4209(3), 82-4210, 82-4211(part).

**Cross-References**  
Evidence, Title 26.  
Judicial notice, Rules 201 and 202, M.R.Ev.  
(see Title 26, ch. 10).

Oaths of witnesses, Rule 603, M.R.Ev. (see Title 26, ch. 10).  
Cross-examination, Rule 611, M.R.Ev. (see Title 26, ch. 10).

Opinions and expert testimony, Rules 701 through 705, M.R.Ev. (see Title 26, ch. 10).  
Documentary evidence, Rules 1001 through 1008, M.R.Ev. (see Title 26, ch. 10).

**2-4-613. Ex parte consultations.** Unless required for disposition of ex parte matters authorized by law, the person or persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a contested case, after issuance of notice of hearing, shall not communicate with any party or his representative in connection with any issue of fact or law in such case except upon notice and opportunity for all parties to participate.

History: En. Sec. 14, Ch. 2, Ex. L. 1971; R.C.M. 1947, 82-4214.

**Cross-References**  
Informal proceedings — record to include ex parte communications, 2-4-604.

**2-4-614. Record — transcription.** (1) The record in a contested case shall include:

- (a) all pleadings, motions, intermediate rulings;
- (b) all evidence received or considered, including a stenographic record of oral proceedings when demanded by a party;
- (c) a statement of matters officially noticed;
- (d) questions and offers of proof, objections, and rulings thereon;
- (e) proposed findings and exceptions;
- (f) any decision, opinion, or report by the hearing examiner or agency member presiding at the hearing;
- (g) all staff memoranda or data submitted to the hearing examiner or members of the agency as evidence in connection with their consideration of the case.

(2) The stenographic record of oral proceedings or any part thereof shall be transcribed on request of any party. Unless otherwise provided by statute, the cost of the transcription shall be paid by the requesting party.

History: En. Sec. 9, Ch. 2, Ex. L. 1971; R.C.M. 1947, 82-4209(5), (6).

**2-4-615 through 2-4-620 reserved.**

**2-4-621. When absent members render decision — proposal for decision and opportunity to submit findings and conclusions — modification by agency.** (1) When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.

(2) The proposal for decision must contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing unless he becomes unavailable to the agency.

(3) The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may

not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

(4) A hearings officer who is a member of an agency adjudicative body may participate in the formulation of the agency's final order, provided he has completed all his duties as hearings officer.

History: En. Sec. 12, Ch. 2, Ex. L. 1971; amd. Sec. 14, Ch. 285, L. 1977; R.C.M. 1947, 82-4212(part); amd. Sec. 4, Ch. 277, L. 1979.

**2-4-622. When hearings officer unavailable for decision.** (1) If the person who conducted the hearing becomes unavailable to the agency, proposed findings of fact may be prepared by a person who has read the record only if the demeanor of witnesses is considered immaterial by all parties.

(2) The parties may waive compliance with 2-4-621 and this section by written stipulation.

History: En. Sec. 12, Ch. 2, Ex. L. 1971; amd. Sec. 14, Ch. 285, L. 1977; R.C.M. 1947, 82-4212(part); amd. Sec. 6, Ch. 42, L. 1997.

Compiler's Comments Chapter 42 in (2), after 1997. "2-4-622". Amendment effective March 12, 1997.

"2-4-621 and", substituted "this section" for

**2-4-623. Final orders — notification — availability.** (1) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

(2) Findings of facts shall be based exclusively on the evidence and on matters officially noticed.

(3) Each conclusion of law shall be supported by authority or by a reasoned opinion.

(4) If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding.

(5) Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

(6) Each agency shall index and make available for public inspection all final decisions and orders, including declaratory rulings under 2-4-501. No such agency decision or order is valid or effective against any person or party nor may it be invoked by the agency for any purpose until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof or when a state statute or federal statute or regulation prohibits public disclosure of the contents of a decision or order.

History: (1), (3) thru (6) En. Sec. 13, Ch. 2, Ex. L. 1971; amd. Sec. 15, Ch. 285, L. 1977; Sec. 82-4213, R.C.M. 1947; (2) En. Sec. 9, Ch. 2, Ex. L. 1971; Sec. 82-4209, R.C.M. 1947; R.C.M. 1947, 82-4209(7), 82-4213.

## 2-4-624 through 2-4-630 reserved.

**2-4-631. Licenses.** (1) When the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license is required by law to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

(2) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(3) Whenever notice is required, no revocation, suspension, annulment, withdrawal, or amendment of any license is lawful unless the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action. If the agency finds that public health, safety, or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

History: En. Sec. 15, Ch. 2, Ex. L. 1971; amd. Sec. 16, Ch. 285, L. 1977; R.C.M. 1947, 82-4216; amd. Sec. 1, Ch. 465, L. 1979.

### Cross-References

Appeals — staying agency decision,

2-4-711.